No. 82-1391

In the Supreme Court of the United States

OCTOBER TERM, 1982

HERBERT SPERLING, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
D. LOWELL JENSEN
Assistant Attorney General
JOEL M. GERSHOWITZ
Attorney
Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the courts below correctly denied relief on this second application by petitioner under 28 U.S.C. 2255, in which he again challenges the court of appeals' holding on direct appeal that although petitioner's conviction on three substantive narcotics counts should be vacated because of a violation of the Jencks Act, 18 U.S.C. 3500, his conviction for engaging in a continuing criminal enterprise in violation of 21 U.S.C. 848 should not be set aside because it was not tainted by the Jencks Act violation.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1b-34b) is reported at 692 F.2d 223. The opinion of the district court (Pet. App. 1d-28d) is reported at 530 F. Supp. 672.

JURISDICTION

The judgment of the court of appeals was entered on October 22, 1982. A petition for rehearing was denied on December 20, 1982 (Pet. App. 1a-2a). The petition for a writ of certiorari was filed on February 17, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In 1973, after a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on three counts of possessing heroin and cocaine with intent to distribute them, in vi-

olation of 21 U.S.C. 841(a)(1) and (b)(1)(A) (Counts 8, 9 and 10); one count of conspiring to commit that offense, in violation of 21 U.S.C. 846 (Count 1); and one count of engaging in a continuing criminal enterprise, in violation of 21 U.S.C. 848 (Count 2). Petitioner was sentenced to life imprisonment on Count 2, and to concurrent 30-year terms of imprisonment on Counts 1, 8, 9 and 10. Petitioner also was fined $100,000 on Count 2 and $200,000 on the remaining counts, and he received a six-year special parole term (Pet. App. 3b). The court of appeals reversed petitioner's convictions on Counts 8, 9 and 10[1] and affirmed his convictions on Counts 1 and 2. 506 F.2d 1323 (1974).[2] This Court denied certiorari. 420 U.S. 962 (1975).

On July 10, 1978, petitioner filed a petition under 28 U.S.C. 2255 seeking to have his conviction and sentence on Count 2 vacated. The district court denied re-

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[1] Rather than retrying petitioner on Counts 8, 9 and 10, the government applied for and was granted an order of nolle prosequi as to those counts. The district court denied petitioner's motion to vacate the nolle prosequi order or, in the alternative, to dismiss the counts with prejudice. The court of appeals dismissed the appeal from that order (Pet. App. 9d-10d).

[2] The court of appeals remanded the case to the district court for resentencing on Count 1, because the sentence on that count was concurrent with the sentences on the reversed substantive counts. 506 F.2d at 1335 n.14. On remand, the district court resentenced petitioner on Count 1 to 30 years' imprisonment and a $50,000 fine, the sentence to run concurrently with the life sentence and $100,000 fine previously imposed on Count 2. 413 F. Supp. 845 (1976). The court of appeals subsequently vacated the sentence imposed on Count 1 on the ground that the conspiracy charged in Count 1 was a lesser offense included in that of engaging in a continuing criminal enterprise charged in Count 2. 560 F.2d 1050 (1977). The court of appeals held, however, that "in the unlikely event that sometime in the future [petitioner's] conviction on Count Two shall be overturned, the sentence imposed on the unaffected conviction on Count One is to be reinstated." *Id.* at 1060.

lief, the court of appeals affirmed, 595 F.2d 1209 (1979), and this Court denied certiorari, 441 U.S. 947 (1979), and rehearing, 444 U.S. 888 (1979). On October 13, 1981, petitioner filed the petition under Section 2255 that is at issue here, seeking to have his sentence on Count 2 vacated on what was conceded to be the same ground that he had raised in his first petition. The district court denied the second petition (Pet. App. 1d-28d), and the court of appeals affirmed (*id.* at 1b-34b).

1. a. The evidence adduced at trial is summarized in the opinion of the court of appeals on direct appeal. 506 F.2d at 1330-1331, 1344. The evidence showed that petitioner and Vincent Pacelli, Jr., were "[a]t the hub" of a "very large, well organized and highly profitable conspiracy" (*id.* at 1330-1331). Evidence concerning the activities of petitioner and his branch of the conspiracy was adduced primarily through the testimony of Joseph Conforti, a former member of the conspiracy, corroborated by the testimony of Cecile Mileto and Zelma Vance, as well as visual and electronic surveillance (*ibid.*; *id.* at 1344). Their testimony established that 13 of the defendants and two of the co-conspirators named in the indictment participated in this branch of the conspiracy (*id.* at 1330-1331). "There was evidence that on more than 26 occasions some or all of these individuals mixed heroin for [petitioner]. Each of these mixing sessions involved possession, diluting and distributing from a half kilo to three kilos of pure heroin" (*id.* at 1344). The testimony also "described approximately 69 meetings, conversations, drugs sales or transfers beginning in early 1971 and continuing through April 1973 involving members of [petitioner's] group" and established that petitioner "supervised and directed the purchase, processing and sale of narcotics within his sphere of control" (*id.* at 1331; see also *id.* at 1344).

b. The principal issue considered by the court of appeals on direct appeal was the government's failure to furnish the defendants with a copy of a letter written by a government witness, David Lipsky, to Assistant United States Attorney Feffer. See 506 F.2d at 1332-1340. The Lipsky-Feffer letter was discovered by the procecution during the retrial of co-conspirator Pacelli several months after imposition of sentence on petitioner and his co-defendants. *Id.* at 1332. The court of appeals held that the government had an obligation under the Jencks Act, 18 U.S.C. 3500(b), to turn the letter over to the defendants and concluded that the letter might have been useful in several respects in impeaching Lipsky's testimony. 506 F.2d at 1333-1334.

The court of appeals then proceeded to determine whether any of the convictions should be reversed because of the Jencks Act violation, noting that "[i]n the context of the record in the instant case, * * * more than an analysis of the letter in the abstract is required before we can determine whether there was a significant chance that its use at trial could have induced sufficient reasonable doubt in the minds of the jurors to have changed the result of the verdicts." 506 F.2d at 1334. The court noted that the cross-examination of Lipsky by ten defense counsel covered more than 400 pages of trial transcript and that on direct and cross-examination he had admitted to a considerable number of facts and circumstances that substantially undermined his credibility. 506 F.2d at 1332.[3] The court of

[3] Lipsky admitted that he had testified falsely before a grand jury in 1970, lied to a federal judge in Florida who had placed him on probation, testified falsely at the two trials of Pacelli about promises made to him, and lied to FBI agents in Florida and to a Nassau County Assistant District Attorney. Lipsky also admitted that he had been convicted for conspiring to transport stolen securities in interstate commerce, that he used cocaine, that he had received promises that he would not be

appeals also observed that other accomplices testified at trial and that this accomplice testimony "was corroborated by an abundance of other independent evidence, including documents, seized drugs, photographs, a tape recording, the results of police surveillance and an undercover investigation, and the testimony of many disinterested witnesses." *Id.* at 1334.

The court found insufficient evidence *other* than Lipsky's testimony to sustain the convictions of any of the appellants for possession and distribution of cocaine and heroin as charged in eight substantive counts, including Counts 8, 9 and 10, on which petitioner was convicted. It therefore reversed and remanded for a new trial on those counts, without expressly weighing the marginal utility of the Lipsky-Feffer letter in impeaching the Lipsky testimony itself in view of the other evidence that substantially undermined his credibility. The court sustained the conspiracy convictions of petitioner and two co-defendants however, concluding upon a careful review of the evidence (506 F.2d at 1335-1337) that even if the Lipsky-Feffer letter had been available at trial, "it would have had no effect whatever upon the jury's verdict as to these appellants on Count One" because "[v]irtually all" of the evidence of petitioner's branch of the conspiracy was unrelated to Lipsky's testimony. *Id.* at 1335. The court also held, without discussion, that petitioner's conviction on the

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prosecuted for narcotics activities and did not expect to be prosecuted for perjury or tax evasion, that he was hopeful the government would exert influence in Nassau County in connection with state murder charges, and that he appreciated the help the U.S. Attorney's Office had given him on the state charges. Moreover, the court of appeals noted that the jury's attention repeatedly was called to a letter Lipsky had written to another Assistant U.S. Attorney, which was available at the time of trial and which likewise reflected an eagerness to assist the government in narcotics cases against Pacelli and others. 506 F.2d at 1332.

continuing criminal enterprise count was unaffected by the absence of the Lipsky-Feffer letter; the conviction was affirmed. *Id.* at 1337 n.18, 1335.

c. Petitioner did not seek rehearing in the court of appeals to review the holding that his conviction on Count 2 for engaging in a continuing criminal enterprise was unaffected by the Jencks Act violation that was held to require reversal of substantive Counts 8, 9 and 10. And although petitioner filed a petition for a writ of certiorari in this Court, he did not seek review with respect to that part of the court of appeals' holding. See Petition for Cert. (No. 74-5653, 1974 Term). This Court denied certiorari. 420 U.S. 962 (1975).

2. On July 10, 1978, petitioner moved pursuant to 28 U.S.C. 2255 to vacate his conviction and sentence on Count 2. He pointed out that the trial court had charged the jury that in order to convict petitioner of having engaged in a continuing criminal enterprise, it had to find that he had committed the offenses charged in Counts 8, 9 and 10 (see Pet. App. 16b-17b; 24d-25d). Since the jury was charged in this manner, petitioner contended that the court of appeals' reversal of his convictions on Counts 8, 9 and 10 on Jencks Act grounds mandated reversal of his conviction on Count 2 as well. The court of appeals' affirmance of his conviction in these circumstances, petitioner maintained, violated his Fifth Amendment right to due process and Sixth Amendment right to trial by jury, because his conviction on Count 2 was affirmed on a basis different from the premise at trial that the jury must find him guilty of committing the offenses charged in Counts 8, 9 and 10.

The district court denied relief. It found that "[petitioner's] commission of the offenses charged under Counts 8, 9 and 10 was amply shown in the record and Count 2 was therefore properly considered by the jury and resolved in favor of the government pursuant to

the charge of the Trial Judge on the issue of the existence of a criminal enterprise under 21 U.S.C. § 848" (Pet. App. 25b n.7). The court held that the nondisclosure of Jencks Act material that resulted in reversal of the convictions on Counts 8, 9 and 10 did not taint the conviction on Count 2 with *constitutional* error because the failure to extend the Jencks Act holding to that Count "raises no issue of constitutional dimension" (*ibid.*). The court also found "no fundamental defect herein which inherently resulted in any miscarriage of justice" that might warrant collateral relief for nonconstitutional error under *Hill* v. *United States*, 368 U.S. 424, 428 (1962), and its progeny (Pet. App. 25b n.7). The court of appeals affirmed the denial of collateral relief, 595 F.2d 1209 (1979), and this Court denied certiorari, 441 U.S. 947 (1979).

Petitioner then filed a petition for rehearing in this Court, contending that his case should be considered together with *Dunn* v. *United States*, 442 U.S. 100 (1979), which had been argued and was then under submission. Petitioner noted the government's concession in *Dunn* that the court of appeals had erred in sustaining the conviction in that case on a theory not charged in the indictment or proved at trial, and he contended that the court of appeals in his case also had affirmed on a basis different from that on which he was tried. Petition for Rehearing at 2-5 (No. 78-1543, 1978 Term). After this Court rendered its unanimous decision in *Dunn*—in which it agreed with the government's concession that the court of appeals there had erred in affirming on a different ground (442 U.S. at 106-107)—the Court denied petitioner's rehearing petition. 444 U.S. 888 (1979).

3. On October 13, 1981, petitioner filed a second application for relief under 28 U.S.C. 2255, raising the same claim that had been raised in the prior application. The district court again denied relief (Pet. App.

1d-28d). The court first held that relief should be denied without reaching the merits because (1) petitioner concededly was presenting the same ground for relief that was presented in the first Section 2255 proceeding; (2) the prior determination against him was on the merits; and (3) the ends of justice would not be served by reaching the merits of the subsequent application (Pet. App. 16d-17d, citing *Sanders* v. *United States*, 373 U.S. 1, 15 (1963)). The court specifically rejected the contention that the ends of justice warranted reconsidering petitioner's claim because the decision in *Dunn* v. *United States*, *supra*, constituted an intervening change in the law. Compare *Sanders* v. *United States*, *supra*, 373 U.S. at 17. Quoting this Court's statement in *Dunn* that the Court there relied on "firmly established" principles of law, the court concluded that *Dunn* did not mark a change in the law (Pet. App. 19d, quoting 442 U.S. at 106). Although the district court had ruled that petitioner was not entitled to have the matter reopened, it nonetheless proceeded to consider the merits and explain once again its conclusion that petitioner's claims of constitutional violations were without substance (Pet. App. 20d-28d).

The court of appeals affirmed the denial of relief in an opinion written by Judge Timbers, who also had written the opinion for the court on direct appeal of petitioner's conviction. The court first agreed with the district court that it was not necessary to reach the merits of petitioner's claim, because, as petitioner conceded, he was making the same argument that was raised in the first Section 2255 proceeding, and the issue had been determined against him on the merits in the prior proceeding (Pet. App. 6b). The court of appeals also rejected petitioner's contention that the decision in *Dunn* constituted an intervening change in the law warranting a fresh examination of petitioner's claims. The court held that *Dunn* had marked no change in the law

and that, in any event, unlike the court of appeals in *Dunn*, it had not affirmed petitioner's conviction on charges other than those on which he had been indicted and tried (Pet. App. 7b).

Although the court thus found it unnecessary to discuss the merits, the court believed it appropriate briefly to make clear that it had affirmed the conviction on Count 2 "*not* on evidence other than that in support of the substantive counts, but precisely on the evidence presented in support of those counts" (Pet. App. 9b; emphasis in original). The court explained that although it had reversed the convictions on Counts 8, 9 and 10 on statutory grounds, this holding did not mean that the jury was foreclosed from considering the Lipsky testimony and thus did not render the evidence of the substantive violations constitutionally insufficient. Accordingly, the court reasoned, it was not inconsistent to have vacated the convictions on Counts 8, 9 and 10 on Jencks Act grounds and yet to conclude that the jury could have found beyond a reasonable doubt that petitioner had committed those offenses, thereby providing a predicate for the conviction on Count 2, as charged to the jury (*id.* at 9b-10b).[4] Judge Kearse dissented (Pet. App. 16b-33b).

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[4] In a separate concurring opinion (Pet. App. 11b-14b) later joined by Judge Timbers (*id.* at 1a-2a), Judge Van Graafeiland further pointed out that on the remand to reconsider the sentence on the conspiracy count, petitioner had argued that the sentence should be vacated because he would "still be saddled with a sentence of life without parole" (*id.* at 11b-12b), and he concluded that petitioner had made other arguments, upon which the court relied in vacating the sentence, that were inconsistent with his present position (*id.* at 12b-13b). Judge Van Graafeiland concuded that "such piecemeal, inconsistent, and mutually exclusive attacks on a judgment of conviction as have occurred in this case" should not be permitted (*id.* at 13b, 14b). He also noted (*id.* at 14b n.1) the acknowledgement by petitioner's counsel that if petitioner's conviction on the continuing criminal enterprise count were set aside, he nevertheless would

ARGUMENT

In this second collateral attack on his 1973 conviction for engaging in a continuing criminal enterprise, petitioner again contends that his conviction should be vacated because of the manner in which the court of appeals, on direct appeal of his conviction, disposed of his claim that the government's failure to turn over the Lipsky-Feffer letter violated the Jencks Act. This precise claim was presented to the district court, court of appeals, and this Court on petitioner's first application for relief under 28 U.S. C. 2255, and the courts below correctly determined that petitioner had presented no grounds for reexamining that claim. The courts below also correctly determined that petitioner was not in any event entitled to collateral relief under 28 U.S.C. 2255.

Petitioner's underlying substantive claim arises out of a novel, nonrecurring set of circumstances and presents no significant, unsettled legal issue of broad importance. We acknowledge that the merits of the issue would present a close question for a court of appeals on direct appeal, but there is here no issue deserving of this Court's consideration, no justification for reopening this rather technical question on a successive petition for collateral review, and no miscarriage of justice calling for corrective action by this Court. In sum, these fact-bound issues no more warrant further review now than they did four years ago, when this Court denied petitioner's petitions for a writ of certiorari and rehearing raising the same claim in the prior proceeding under 28 U.S.C. 2255.

1. a. The courts below correctly held that it was not even necessary to address petitioner's claim on the

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oppose reinstatement of the sentence on the conspiracy count that petitioner had successfully argued to the court of appeals should be vacated because conspiracy was a lesser included offense in the continuing criminal enterprise offense charged in Count 2. See note 2, *supra*.

merits because that claim had been presented and rejected in the prior Section 2255 proceeding. In *Sanders* v. *United States*, 373 U.S. 1, 15 (1963), the Court held that controlling weight may be given to the disposition of a prior application for relief under Section 2255 "if (1) the same ground presented in the subsequent application was determined adversely to the applicant on the prior application, (2) the prior determination was on the merits, and (3) the ends of justice would not be served by reaching the merits of the subsequent application." See also 28 U.S.C. 2244(a). Petitioner does not dispute that he is presenting the same ground for relief that was presented in his previous application (see Pet. App. 6b). He appears to argue (Pet. 9-13, 16-20, 26-29), however, that the lower courts somehow did not understand his contentions on the prior occasion and thus did not then determine this ground for relief against him on the merits. This fact-bound contention does not warrant review and is, at all events, erroneous.

In the first sentence of its opinion on petitioner's first application for relief under Section 2255, the district court stated the issue petitioner was raising: "'Sperling contends that the absence of a 'guilty' verdict on three of the substantive counts in the indictment (8, 9 [and] 10) removes the basis for his conviction for engaging in a continuing Criminal Enterprise under 21 U.S.C. 848 (Count 2) because the charge of the jury required it to find that he had *committed the offenses* set forth in those counts'" (Pet. App. 24b n.7; emphasis in original). This is precisely the contention petitioner now makes (see Pet. 12). The court then expressly rejected petitioner's position that the affirmance on Count 2 in those circumstances violated his constitutional rights (Pet. App. 25b n.7; see pages 6-7, *supra*). The court of appeals summarily affirmed, and this Court denied certiorari and rehearing without any noted dissent. There is

no indication that the lower courts (or this Court) failed to understand or "refused to consider" petitioner's constitutional argument in the prior Section 2255 proceeding, as petitioner contends (Pet. 26); they simply found that argument to be without merit.[5]

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[5] We note also that petitioner raised the Jencks Act issue on direct appeal, and the court of appeals decided that Counts 1 and 2 were unaffected by the Jencks Act violation. Even petitioner's first Section 2255 application could have been rejected on the ground that the issue had been addressed on direct appeal. See *Kaufman* v. *United States*, 394 U.S. 217, 227 n.8 (1969). Petitioner, on direct appeal, apparently did not specifically call the court of appeals' attention to the fact that the indictment and jury instructions with respect to Count 2 referred to Counts 8, 9 and 10. But this is merely an additional, more focused legal argument in support of the same ground for relief the court of appeals considered and rejected—*i.e*, that the conviction on Count 2 should be vacated on Jencks Act grounds. The fact that an applicant has advanced a new legal argument does not mean that he is presenting a distinct ground for relief. See *Sanders* v. *United States*, *supra*, 373 U.S. at 16.

Moreover, even if the argument based on the wording of the indictment and jury charge were viewed as a distinct "ground" for relief, there is a substantial question whether petitioner adequately demonstrated "cause" for failing to raise it on direct appeal. See *United States* v. *Frady*, 456 U.S. 152, 167-168 & n.16 (1982). In fact, on the first Section 2255 application, the district court held that petitioner had not demonstrated cause for this default (Pet. App. 25b-26b n.7). Even after the court of appeals sustained his conviction on Count 2, petitioner did not file a rehearing petition arguing that Count 2 was so tied to Counts 8, 9 and 10 and that it therefore should be vacated as well. Nor did he raise this issue in his certiorari petition. It is true that petitioner proceeded pro se in this Court. However, petitioner's current argument is drawn from the face of the indictment and jury instructions, and petitioner subsequently proved to be a skilled advocate, since he succeeded in convincing the court of appeals that his sentence on the conspiracy count should be vacated because it was a lesser included offense. See note 2, *supra*.

b. Where a ground for relief has been decided adversely to the applicant in the prior Section 2255 proceeding, the applicant bears the burden of showing that the ends of justice would be served if the courts nevertheless were to redetermine the ground previously rejected. *Sanders* v. *United States*, *supra*, 373 U.S. at 17. Petitioner makes no effort in his certiorari petition to carry that burden. In the courts below, he contended that this Court's decision in *Dunn* v. *United States*, *supra*, constituted an intervening change in the law that warranted re-examination of his constitutional argument. That contention was correctly rejected on the grounds (i) that the constitutional holding in *Dunn* did not mark a change in the law but instead explicitly rested on "firmly established" principles (Pet. App. 7b; 18d-19d), and (ii) that, in any event, here, unlike in *Dunn*, the court of appeals did not affirm petitioner's conviction on Count 2 on the basis of charges other than those on which he was indicted and convicted (Pet. App. 7b).[6]

Nor does this case present other factors that might warrant re-examination of petitioner's claim. Petitioner

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[6] Dunn was indicted and convicted of making a false statement under oath in a lawyer's office on September 30, 1976, but his conviction was upheld on the basis of a statement made in a judicial hearing on October 20, 1976. See 442 U.S. at 103-104. While the statements were the same in content, each was potentially a distinct offense for which Dunn could, if convicted, be separately punished. Here, by contrast, the offense was the management of a continuing illegal drug enterprise. Having been convicted of that offense, petitioner could not, consistent with double jeopardy principles, be convicted for conducting the same enterprise in a new indictment relying upon one or more different predicate offenses. Thus, the identification of particular predicate offenses in a Section 848 indictment is not central to the identification of the offense committed, in contrast to *Dunn*, where identification of the particular false statement was an indispensable element of the offense.

does not argue that the trial error to which he objected on direct appeal—the government's failure to discover and turn over the Lipsky-Feffer letter—violated his constitutional rights under *Brady* v. *Maryland*, 373 U.S. 83 (1963), and its progeny; only a violation of the Jencks Act is involved. Thus, this is not a case in which a person might be held in custody even though his trial was tainted with constitutional error.

Moreover, in view of the abundance of other material that was available to defense counsel at trial to impeach Lipsky—including his admission to numerous lies before other tribunals and to government officials and his expectation of assistance from the government in connection with state murder charges (see note 3, *supra*)—the court of appeals' holding on direct appeal that the availability of the Lipsky-Feffer letter at trial might have induced sufficient doubt in the jurors' minds to have changed the result on Counts 8, 9 and 10 was of questionable validity. Indeed, the court of appeals did not even address the marginal utility of the Lipsky-Feffer letter in impeaching Lipsky's testimony (506 F.2d at 1335). In these circumstances, the court of appeals' failure on direct appeal to apply the Jencks Act holding to Count 2 did not result in manifest injustice.

Furthermore, this is not a case in which an innocent man will stand convicted if the merits are not reexamined. Petitioner does not profess his innocence of having engaged in a continuing criminal enterprise, and he expressly disclaims (Pet. 23 n.3) any suggestion that the evidence at trial was insufficient to support his conviction for having done so. He argues only the highly technical point that in the peculiar circumstances of this case, in which the jury was charged that it must find that he committed the specific offenses charged in Counts 8, 9 and 10 in order to convict him on Count 2, the court of appeals' vacating of the convictions on the former counts removed the basis for his conviction on

the latter. But as the court of appeals observed (Pet. App. 8b), the indictment and instructions specifically referring to the offenses charged in Counts 8, 9 and 10 were more favorable to petitioner than was required; it was not necessary that particular offenses be separately charged. There was ample evidence of other such violations that the jury must have found were committed by petitioner in order to find that he had committed a *series* of violations of the narcotics laws and therefore engaged in a continuing criminal enterprise. 21 U.S.C. 848(b)(2).

What is more, under 21 U.S.C. 848(b)(1), the first element of the offense of engaging in a continuing criminal enterprise is that the defendant has committed *any* violation of Chapter 13 of Title 21. That element was satisfied here by virtue of the jury's verdict that he was guilty of conspiring to violate the narcotics laws, in violation of 21 U.S.C. 846(a)(1). The court of appeals affirmed the conspiracy conviction, finding that it was unaffected by the Jencks Act violation (506 F.2d at 1335-1337), and petitioner does not question the validity of that conclusion here. The other elements of the offense of engaging in a continuing criminal enterprise set forth in 21 U.S.C 848(b)(2)—that the predicate violation found under 21 U.S.C. 848(b)(1) was part of a continuing series of such violations undertaken in concert with five or more persons with respect to whom the defendant occupied a supervisory role and that the defendant derived substantial income or resources from the enterprise—necessarily were found by the jury beyond a reasonable doubt on the basis of evidence that was entirely unrelated to Lipsky's testimony. See 506 F.2d at 1344. Thus, even aside from Counts 8, 9 and 10, the jury found that petitioner had committed all of the necessary elements of the offense stated in 21 U.S.C 848, and those findings were wholly unaffected by the

court of appeals' subsequent ruling on the Jencks Act question with respect to Counts 8, 9 and 10.

Under such circumstances, far from entailing an unconstitutional affirmance of a conviction on a basis not charged in the indictment or submitted to the jury, or even a nonconstitutional error in treating the effects of the Jencks Act violation inconsistently for purposes of reviewing the substantive counts and the continuing enterprise count, we believe that reversal of the continuing enterprise count on direct appeal would probably have been error. While the indictment specified Counts 8, 9 and 10 as the predicate offenses triggering the Section 848 violation, the grand jury also charged petitioner with another felony, the conspiracy, that was indisputably part of the charged illicit enterprise. Thus, the validity of the Section 848 charge returned by the grand jury did not depend upon its specification of only three of the four potentially available felony charges it returned against petitioner. By the same token, although the petit jury was charged that it should convict on Count 2 only if it convicted on Counts 8, 9 and 10, the latter convictions were not, as it turned out, indispensible to the former in light of the conspiracy conviction, which constituted a specific (and error-free) determination by the jury of the commission of a predicate offense. With every element necessary to sustain the continuing criminal enterprise conviction charged by the grand jury and found by the petit jury apart from the offenses specified in Counts 8, 9 and 10, affirmance of those convictions was not a prerequisite to affirmance of the conviction on Count 2.[7] Especially against

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[7] We stress that the identification of a particular predicate felony offense satisfying the definitional requirement of Section 848(b)(1) is not an element of the continuing enterprise offense in the same way as identifying the bank that was robbed or the false statement that was made is an element of bank robbery or perjury. See note 6, *supra*. Rather, it is analogous to the speci-

this background, there is no injustice in declining to examine the merits of petitioner's claim once again.

2. a. Even if petitioner's claim were not foreclosed by the rejection of his prior application under Section 2255, the courts below correctly held that petitioner was not entitled to collateral relief. Petitioner's claim is that the court of appeals should have vacated his conviction on Count 2 when it vacated his conviction on Counts 8, 9 and 10. Petitioner casts this argument in constitutional terms, contending that when the convictions on Counts 8, 9 and 10 were vacated, the predicate for a violation of 21 U.S.C. 848 as charged in this case was removed, and that the court of appeals therefore must have affirmed his conviction on a basis different from that on which he was charged and tried. At bottom, however, petitioner's argument is simply that the court of appeals erred in not applying its Jencks Act holding on Counts 8, 9 and 10 to Count 2 as well, in view of the linking of the counts in the indictment and jury instruction.[8] The court of appeals' failure to vacate the conviction on Count 2 on the basis of a statutory violation is not converted into a constitutional defect in

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fication of an overt act in a prosecution for conspiracy under 18 U.S.C. 371. While an overt act must be proven for a Section 371 conviction, just as a predicate felony must be proven for a Section 848 conviction, the overt act need not be the one specified in the indictment, so long as it is clear that the jury in fact found that an overt act had been committed in furtherance of the conspiracy. See *United States* v. *Adamo*, 534 F.2d 31, 38-39 (3d Cir.), cert. denied, 429 U.S. 841 (1976).

[8] Petitioner does not contend that he is entitled to collateral relief on the pure statutory ground that the court of appeals erred in not vacating his conviction because of the Jencks Act violation, and such a violation, especially in the circumstances of this case, is not in any event a "fundamental defect which inherently results in a complete miscarriage of justice" (*Hill* v. *United States*, *supra*, 368 U.S. at 428). See, *e.g.*, *Houser* v. *United States*, 508 F.2d 509, 515 (8th Cir. 1974).

his conviction merely because the court of appeals accepted this same statutory claim of error as to three other counts.

b. The premise of petitioner's argument seems to be that a conviction on Counts 8, 9 and 10 was a necessary predicate to the jury's finding him guilty of engaging in a continuing criminal enterprise. See Pet. 12. But this is not so, as noted above, even under the particular indictment and jury instructions in this case, because of the conviction on Count 1. And even apart from Count 1, petitioner's argument is faulty. Petitioner was not charged with an offense of which a necessary element was that the defendant shall have been *convicted* of another crime, such that an invalidation of that predicate conviction automatically would remove, albeit retroactively, all evidence of a necessary element of the offense. Compare *Dickerson* v. *New Banner Institute, Inc.*, No. 81-1180 (Feb. 23, 1983), slip op. 7 (18 U.S.C. 922(g)(1) and (h)(1)); *Lewis* v. *United States*, 445 U.S. 55, 60-61 & n.5 (1980) (18 U.S.C. App. 1202(a)(1)). Cf. *Jackson* v. *Virginia*, 443 U.S. 307, 325 (1979). Here, as both courts below concluded (Pet. App. 10b n.2; 23d-27d), the jury was required to find, as an element of the offense charged in Count 2, only that petitioner had *committed* the offenses charged in Counts 8, 9 and 10. This the jury did. The court of appeals' reversal of the convictions on Counts 8, 9 and 10 on Jencks Act grounds because the defense was entitled to place *additional* evidence (the Lipsky-Feffer letter) before the jury did not erase the jury's finding on the evidence it did have before it that petitioner in fact had committed the offenses charged in Counts 8, 9 and 10. Nor did the reversal of those counts on Jencks Act grounds render the evidence on which the jury convicted petitioner constitutionally insufficient, such that a rational factfinder could not find him guilty beyond a reasonable doubt. *Jackson* v. *Virginia*, *supra*, 443 U.S. at 324.

c. Petitioner also contends (Pet. 15, 19-21) that his rights to due process and to a jury trial were violated because the court of appeals, on direct appeal, affirmed his conviction on Count 2 on a basis different from that on which he was tried. As explained above (see page 16, *supra*), however, the affirmance on the conspiracy count and the jury's finding that petitioner engaged in a series of narcotics violations would have furnished a basis for affirming Count 2 notwithstanding the reversal on Counts 8, 9 and 10. In any event, Judge Timbers, who wrote the opinion on direct appeal, held for the majority below that the conviction on Count 2 had been affirmed on direct appeal "*not* on evidence other than that in support of the substantive counts, but precisely on the evidence presented in support of those counts" (Pet. App. 9b; emphasis in original). Petitioner's disagreement with the court's interpretation of its own prior affirmance does not warrant review by this Court.

Moreover, there is nothing on the face of the opinion on direct appeal that refutes the court of appeals' interpretation of its previous actions. Petitioner and Judge Kearse in her dissent point to the court's recitation on direct appeal of evidence, other than Lipsky's testimony, regarding petitioner's branch of the conspiracy and his role in the enterprise (506 F.2d at 1330-1331, 1344), and they argue (Pet. 15, 20-21; Pet. App. 18b-19b) that this recitation shows that the court must have substituted the narcotics offenses that this evidence clearly established for the violations charged in Counts 8, 9 and 10 in order to find a predicate narcotics felony offense. This contention is in error.

The opinion on direct appeal did not address the precise issue now raised by petitioner, and it therefore did not discuss the language in the indictment and jury instructions on Count 2 that referred to Counts 8, 9 and 10 or the requirement in 21 U.S.C. 848(b)(1) that a predicate felony violation of the narcotics laws be prov-

en. As we have explained above (see page 15, *supra*), the gravamen of the offense of engaging in a continuing criminal enterprise is set forth in 21 U.S.C. 848(b)(2): that the defendant occupied a position of organizer, supervisor, or manager with respect to five or more persons in an on-going criminal operation that involved a series of violations of the narcotics laws (of which the predicate felony offense is only one) and that generated substantial profits for the defendant. All of the evidence recited by the court of appeals on which petitioner and Judge Kearse rely clearly was relevant to establishing these various elements of the offense of engaging in a continuing criminal enterprise.

Moreover, in its discussion at 506 F.2d at 1344, which Judge Kearse specifically cites (Pet. App. 18b-19b), the court was addressing petitioner's arguments that the evidence was insufficient to establish that he played the requisite "kingpin" role and what petitioner asserted to be another element in 21 U.S.C. 848(b)(2)—that five or more persons worked in the narcotics business at the same time. The court's discussion did not address the separate issue of a predicate felony violation under 21 U.S.C. 848(b)(1) or discuss the evidence of any particular offense that could serve as that predicate felony violation. Given the overwhelming evidence that petitioner committed a *series* of felonies, it is hardly surprising that the court of appeals did not separately address the requirement that a predicate felony violation be shown. This is especially so in view of the apparent failure by petitioner and the government to call the court's attention to the language in the indictment and jury instructions referring to Counts 8, 9 and 10 as the predicate violations (see Pet. App. 18b n.2). It may well be that the court of appeals on direct appeal did not focus on the evidentiary point petitioner now raises. But failing to address an issue is something far different from actually affirming a conviction on the basis of evidence of an

offense *other* than that charged at trial, as in *Dunn*. The opinion on direct appeal does not establish that the court of appeals did the latter.[9]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General
D. LOWELL JENSEN
Assistant Attorney General
JOEL M. GERSHOWITZ
Attorney

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[9] Petitioner also alleges (Pet. 9, 13, 17-18 n.1, 30) that there were certain ex parte contacts between the judge who ruled on the Section 2255 motion and the United States Attorney. However, those allegations rest on hearsay, unsupported by a sworn affidavit of a person having first hand knowledge (cf. 28 U.S.C. 144), and they were raised for the first time in a telegram sent to the court of appeals after the case was under submission. Especially in these circumstances, the court of appeals correctly decided the appeal on the record before it (Pet. App. 10b n.3).